JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

Mohammad Khair bin Hormat & Anor v Lakshmanan Krishnan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–970 OF 2008
GOPAL SRI RAM, AHMAD MAAROP JJCA AND KANG HWEE GEE J
3 MARCH 2009

Contract — Breach — Agreement — Sale and purchase agreement — Breach — Failure to deliver vacant possession — Trial judge allowed plaintiff's claim — Appeal against order — Whether trial judge misdirected herself on facts — Whether plaintiff's claim ought to be evaluated on higher standard because deceased vendor was not present to defend herself

Lakshmanan Krishnan ('the plaintiff') had decided to purchase a property owned by Sulaimah Marji ('the deceased') for the sum of RM1.5m. After having decided to purchase the property he instructed his solicitor to prepare the sale and purchase agreement ('the SPA'). On 16 June 2003, the solicitor arranged for the parties to meet in his office to execute the SPA. However, the parties never met because the plaintiff who arrived first had executed the SPA and left before the deceased vendor and her son, Mohammad Khair bin Hormat ('the first defendant'), arrived. According to the solicitor he had explained the SPA to the deceased vendor before she executed the same. Thereafter the solicitor had handed to the deceased a cheque made in favour of the deceased for the sum of RM1.5m, being the purchase price of the property. When the deceased realised that the cheque was made in her favour, she requested that the cheque be made out in the first defendant's name. The plaintiff then issued a new cheque in favour of the first defendant and the vendor signed an authorisation letter that the plaintiff purchaser had made the cheque in favour of the first defendant at her request. Although the first defendant had cashed the cheque and the property was registered in the plaintiff's name, the first defendant had not delivered vacant possession of the property to the plaintiff. The plaintiff thus commenced the present suit wherein it sought, inter alia, a mandatory injunction directing the defendants, as executors of the deceased's estate, to effect a transfer of the property to the plaintiff. The defendant's case was that the consideration for the sale was not RM1.5m but RM3m. The trial judge found that the defendant's case was in essence a denial of the plaintiff's case and was contrary to the documentary evidence produced by the plaintiff. The High Court held that the plaintiff had proved his case on a balance of probabilities and allowed the claim with costs. This was the defendants' appeal against that decision. It was the defendants' contention that the trial judge had failed to judicially appreciate the evidence led by both sides and had misdirected herself on the facts. The defendants

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

further submitted that the plaintiff's claim ought to have been evaluated on a higher standard because the deceased vendor was not present to defend herself.

Held, dismissing the appeal with costs:

(1) It was found that the trial judge had properly evaluated the evidence and asked herself the right question. There was therefore no merit in the defendants' contention that the trial judge had misdirected herself on the facts (see para 5).

(2) In the present case the plaintiff's case was supported by the evidence of the solicitor who attended to the execution of the SPA. The solicitor, an independent witness who had given evidence as to the circumstances in which the transaction was completed, provided independent confirmation supporting the plaintiff's case. In the circumstances, the plaintiff's case could not be treated as a false claim against the deceased vendor (see para 9).

[Bahasa Malaysia summary

Lakshmanan Krishnan ('plaintif') telah memutuskan untuk membeli hartanah yang dimiliki oleh Sulaimah Marji ('si mati') untuk jumlah RM1.5 juta. Selepas memutuskan untuk membeli hartanah dia mengarahkan peguamnya untuk menyediakan perjanjian jual beli ('SPA'). Pada 16 Jun 2003, peguam mengaturkan pihak-pihak untuk berjumpa di pejabatnya untuk melaksanakan SPA tersebut. Walau bagaimanapun, pihak-pihak tidak pernah berjumpa kerana plaintif yang datang dahulu telah menyempurnakan SPA tersebut dan meninggalkan pejabat tersebut sebelum si mati penjual dan anak lelakinya, Mohammad Khair bin Hormat ('defendan pertama'), tiba. Mengikut peguam dia telah menjelaskan SPA tersebut kepada si mati penjual sebelum dia menyempurnakan SPA tersebut. Kemudiannya peguam tersebut telah memberikan si mati cek yang dibuat atas nama si mati untuk sejumlah RM1.5 juta, sebagai harga belian hartanah tersebut. Apabila si mati perasan yang cek dibuat atas namanya, dia memohon yang cek tersebut dibuat di dalam nama defendan pertama. Plaintif kemudiannya mengeluarkan cek baru atas nama defendan pertama dan penjual menandatangani surat memberi kuasa bahawa plaintif pembeli membuat cek tersebut atas nama defendan pertama mengikut permintaannya. Walaupun defendan pertama telah menunaikan cek dan hartanah tersebut didaftarkan di atas nama plaintif, defendan pertama tidak memberi milikan kosong hartanah tersebut kepada plaintif. Plaintif oleh itu memulakan tindakan ini di mana ia memohon, antara lain, injunksi mandatori mengarahkan defendan-defendan, sebagai pentadbir estet si mati, untuk menyempurnakan pindah milik hartanah tersebut kepada plaintif. Kes defendan adalah bahawa balasan untuk jualan bukan RM1.5 juta tetapi RM3 juta. Hakim bicara mendapati bahawa kes defendan pada dasarnya penafian kes plaintif dan betentangan dengan keterangan dokumentar yang dikemukakan oleh plaintif. Mahkamah Tinggi memutuskan bahawa plaintif

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

telah membuktikan kesnya atas imbangan kebarangkalian dan membenarkan tuntutan dengan kos. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut. Ia adalah hujahan defendan-defendan bahawa hakim bicara telah gagal untuk menghakimi keterangan yang diberikan oleh kedua-dua pihak dan telah tersalah arah dirinya atas fakta. Defendan-defendan selanjutnya menghujah bahawa tuntutan plaintif patut dinilaikan atas standard lebih tinggi kerana si mati penjual tidak hadir untuk membela dirinya.

Diputuskan, menolak rayuan dengan kos:

(1) Ia didapati bahawa hakim bicara telah menilai keterangan dengan betul dan menanya dirinya soalan yang betul. Tidak terdapat merit di dalam hujahan defendan-defendan bahawa hakim bicara telah tersalah arah dirinya atas fakta (lihat perenggan 5).

(2) Dalam kes ini, kes plaintif disokong oleh keterangan peguam yang menghadiri penyempurnaan SPA. Peguam tersebut, saksi bebas yang telah memberikan keterangan terhadap keadaan di mana transaksi diselesaikan, memperuntukkan pengesahan bebas menyokong kes plaintif. Dalam keadaan ini, kes plaintif tidak boleh dijadikan sebagai tuntutan palsu terhadap si mati penjual (lihat perenggan 9).]

Notes

For cases on agreement of sale and purchase, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2573–2580.

Cases referred to

Lachmi Parshad v Maharajah Narendro Kishore Singh Bahadur LR 19 Indian Appeal 9, PC (refd)

Plunkett v Bull (1915) 19 CLR 544, HC (refd)

Appeal from: Civil Suit No S2–22–783 of 2004 (High Court, Kuala Lumpur)

Shahabudin Shaik Alaudin (Rosnida Che Ibrahim with him) (Sheik & Shaik) for the appellant.

Karpal Singh (Nicholas Netto with him) (Karpal Singh & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is by the defendant in the court below against the judgment of the learned judge allowing the plaintiff's claim, inter alia, for a mandatory injunction directing the former to effect a transfer of the property which is the subject matter of the dispute. The facts relevant to this appeal are as follows.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

[3] By an agreement dated 16 June 2003 the deceased vendor of the subject property agreed to sell it to the plaintiff ('the respondent') for the sum of RM1.5m. The defendant's case in the court below was that the consideration for the sale was not RM1.5m but RM3m. The chronology of events that led to the execution of the agreement and the surrounding circumstances have been admirably dealt with by the learned judge who tried the case. We find it sufficient to quote from her:

> According to the plaintiff he was informed by one Tanimalai of the property for sale at a price of RM 1.5 million. He went with Tanimalai to take a look at the property from the outside. The plaintiff said he has never met with Sulaimah Marji ('the vendor'). Having decided to purchase the property, the plaintiff instructed his solicitors Messrs Mohamed, Jarjit & Partners to prepare the SPA.
>
> On 16 June 2003 the plaintiff went to his solicitor's firm and signed the SPA witnessed by his solicitor, Mr Jarjit ('SP3') and handed to SP3 a cheque for the sum of RM 1.5m being the purchase price made out in the name of the vendor. At the time the plaintiff was at his solicitor's office, he was told by SP3 that the vendor had not arrived. The plaintiff then left.
>
> According to SP3 he had made appointments for the parties to be at his office that day but the plaintiff arrived first. After the plaintiff had left, the vendor, Sulaimah Marji and her son the first defendant ('D1') and one Abdullah Bacha arrived together. SP3 said he went through and explained the SPA and the vendor initialed on each page of the SPA and signed it witnessed by D1. A copy of the SPA was given to D1. The details of the vendor was from her identity card which she gave to SP3. SP3 also prepared a letter acknowledging receipt of payment of the purchase price and the vendor signed it ('P3'). SP3 then handed to the vendor the plaintiff's cheque but according to SP3 when the vendor noticed that the cheque was made out in her name, she requested that the cheque be made out in Abdullah Bacha's name instead. SP3 then called the plaintiff to relay the vendor's request.
>
> According to the plaintiff he inquired from SP3 whether it was safe to do so but SP3 told him it should not be a problem as long as the vendor gave an authorisation letter. Pursuant to this, the plaintiff then issued a new cheque in Abdullah Bacha's name as requested and returned to SP3's office. SP3 went down to meet the plaintiff and collected the new cheque and returned the earlier cheque. SP3 then prepared an authorisation letter which was signed by the Vendor ('exh P4'). SP3 obtained Abdullah Bacha's details for the purpose of the authorisation letter from his identity card which was given to SP3. According to SP3 the authorisation letter P4 was to protect his client, the plaintiff, interest as the request by the vendor was to make the payment cheque payable to Abdullah Bacha who is not a party to the sale and purchase transaction. The new cheque in Abdullah Bacha's name was handed to him ('Abdullah Bacha') and they then left SP3's office. SP3 said that he did not doubt the identity of the Vendor and of Abdullah Bacha who appeared before him that day.
>
> On 18 June 2003, ie two days after the signing of the SPA and the payment made, SP3 said Abdullah Bacha called him to inform him of his difficulty to cash the cheque. SP3 requested Abdullah Bacha to contact the plaintiff to sort out the matter. SP3 also called the plaintiff to inform him of this matter. The plaintiff said that after the call from SP3, the vendor called him telling him that the cheque in Abdullah

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

Bacha's name could not be cashed and requested a new cash cheque to be issued. The plaintiff said the bank contacted him and he was advised by the bank to issue a cash cheque in his own name and to endorse on the back of the cheque. The bank informed him that someone from the bank will come to the plaintiff's office with Abdullah Bacha. Shortly after, two officers from the bank together with Abdullah Bacha came to meet him. Abdullah Bacha returned the cheque issued in his name and the plaintiff issued a new cash cheque in his own name and endorsed the cheque by signing on the back of the cheque and handed over the cheque to Abdullah Bacha ('exh P8(b)'). The amount of RM1.5m was debited from the plaintiff's account as evidence by exh P5. Payment of the money to Abdullah Bacha was confirmed by SP2, the bank officer, based on the particulars written on the back of the cheque.

SP3 said that later he received a call from Abdullah Bacha to tell him that the cheque had been cashed. The plaintiff had also informed him that the cheque had been cleared. SP3 then proceeded with the transaction and the property was registered in plaintiff's name ('exh D19'). According to the plaintiff he took it for granted that the vendor will give him vacant possession of the property but he was mistaken as until the date of hearing, vacant possession has not been delivered.

SP3 denied the defendant's counsel suggestion that the intended purchaser of the property was Abdullah Bacha or that the purchase price was RM 3m. SP3 denied he knew of any transaction between the vendor and Abdullah Bacha. He denied that the vendor, Abdullah Bacha and D1 came to his office to prepare the sale and purchase agreement because he is Abdullah Bacha's lawyer. SP3 said he had never met the vendor prior to the day of the signing of the SPA. He had met Abdullah Bacha and D1 once prior to the date of signing of the SPA.

[4] After considering the rival contentions of the parties both evidential and by way of argument, the learned judge made the following finding with which we are entirely in agreement:

> The defendants' case is in essence a denial of the plaintiff's case and is contrary to the documentary evidence produced by the plaintiff. Unfortunately except for the evidence of D1, no other credible evidence in support of the assertions made by D1 was forthcoming. However there is evidence that a sale of the property had been concluded. There is evidence that payment had been made according to instructions by the deceased vendor. There is no dispute that the property is registered in the plaintiff's name. There is admission that vacant possession had not been given to the plaintiff till now. I find that the plaintiff is a bona fide purchaser. The evidence shows that prior to the sale, the plaintiff does not know defendants and Abdullah Bacha. The evidence also shows that there is separate deal between the defendants and Abdullah Bacha. There is no evidence to suggest that the plaintiff is a party to this deal or even knew of it. This is confirmed when D1 lodged a report against Abdullah Bacha only. Thus considering the evidence as a whole, I find that on a balance of probabilities the plaintiff has proved his case. I therefore allowed his claim with costs.

[5] Before us the findings of the learned judge were attacked principally on the ground that she had failed to judicially appreciate the evidence led by both

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

sides before her. The complaint here is that the learned judge asked herself the wrong question namely whether the defendants had proved their case. The question the judge should have asked herself is whether the plaintiff had proved his case. Having read the passages quoted above, it is apparent that the learned judge did in fact properly evaluate the evidence and asked herself the right question. There is therefore no merit in the suggestion that the learned judge misdirected herself on the facts.

[6] However, a more important submission has also been made before us. The deceased vendor died before the action was brought. The plaintiff's claim ought therefore to have been evaluated on a higher standard because the vendor was not there to defend herself. The defendants in the absence of their most important witness put the best case they could before the court. It follows, so the argument goes, that learned judge treated the plaintiff's case with leniency unwarranted in the circumstances.

[7] Now, there is no dispute about the principle that governs a claim as the one here. It is set out in the judgment of Lord Morris in the Privy Council case of *Lachmi Parshad v Maharajah Narendro Kishore Singh Bahadur* LR 19 Indian Appeal 9 as follows:

> in an action brought to recover money against an executor, or, as in this case, the heir, of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the fact will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give and account for himself.

[8] This passage was quoted with approval in the judgment of Isaacs J in *Plunkett v Bull* (1915) 19 CLR 544, 549 and this is what that most learned judge said:

> [I]t is not that the court looks on the plaintiff's case with suspicion and as prima facie fraudulent, but it scrutinises the evidence very carefully to see whether it is true or untrue.

[9] Now apply that principle here. According to the plaintiff, his case was supported by the evidence of the solicitor who attended to the execution of the sale and purchase agreement. The solicitor ('PW3') gave evidence as to the circumstances in which the transaction was completed. It is rightly conceded by learned counsel for the defendant/appellant that PW3 is an independent witness. So if you want independent confirmation supporting the plaintiff's case, there you have it.

[10] For the reasons already given, we found it unnecessary to call upon the

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Sep 30 14:03:56 2011
//caseml/case/mlj/09-Mohammad_Khair_185582_126936_01

counsel for the respondent to mount an argument in answer to this appeal. The appeal is dismissed and the respondent will have the costs of the appeal. The deposit will be paid to the respondent to account of his taxed costs. The orders of the High Court are affirmed.

Appeal dismissed with costs.

Reported by Kohila Nesan